No. 12572

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

JOHN D. ROSS, Sheriff of Santa Barbara County, State of California,

Appellant,

vs.

SYLVESTER MIDDLEBROOKS, JR.,

Appellee.

APPELLANT'S REPLY BRIEF.

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TABLE OF AUTHORITIES CITED

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Part V of appellee's brief (pp. 21-28) advances the argument that the extradition clause of the Constitution (Art. IV, Sec. 2, Clause 2) and the scope of restricted inquiry embodied in such provision is applicable solely to extradition of fugitives for purposes of trial and not to convicted fugitives.

The weight of authority is directly *contra* to appellee's position.

In *Hughes v. Pflanz* (Sixth), 138 Fed. 90 (1905), the court said at page 983:

> "The term 'charged with crime,' as used in the Constitution and statute, seems to us to have been used in its broad sense, and to include all persons accused

of crime. It would be a very narrow and technical construction to hold that after the accusation, and before conviction, a person could be extradited, while after conviction, which establishes the charge conclusively, he could escape extradition. The object of the provisions of the Constitution and statute is to prevent the escape of persons charged with crime, whether convicted or unconvicted, and to secure their return and punishment if guilty. Taking the broad definition of 'charged with crime' as including the responsibility for crime, the charge would not cease or be merged in the conviction, but would stand until the judgment is satisfied. It would include every person accused, until he should be acquitted, or until the judgment inflicted should be satisfied. Any other construction would prevent the return of escaped convicts upon the charge under which they had been sentenced, and defeat in many instances the ends of justice.

"The relator was convicted of the crime of larceny in Indiana, and sentenced, and the term of sentence has not yet expired. That charge of larceny continues to be a charge against him until the sentence has been performed, and he therefore stands 'charged with crime,' within the meaning of that term as used in the federal Constitution. The question has not often been raised, but in the only instances called to our attention where it has been the foregoing views have been adopted. *In re* Hope, 10 N. Y. Supp. 28; Drinkall v. Spielgel, Sheriff, 68 Conn. 441, 36 Atl. 830; 36 L. R. A. 486."

In *Reed v. Colpoys* (1938), U. S. Court of Appeals for the District of Columbia, 99 F. 2d 396, it was urged that a paroled prisoner who had violated his parole was not a fugitive from justice within the terms of Art. IV, Sec. 2,

Clause 2, of the U. S. Constitution. The court said at page 397:

> "The contention is wholly without merit. It is settled law that one is a fugitive from justice within the purview of the Constitutional provision who, having been charged with crime in the demanding State, leaves that State for any purpose whatsoever. Appleyard v. Massachusetts, 1906, 203 U. S. 222, 227, 27 S. Ct. 122, 51 L. Ed. 161, 7 Ann. Cas. 1073; *Ex parte* Reggel, 1885, 114 U. S. 642, 5 S. Ct. 1148, 29 L. Ed. 250; Roberts v. Reilly, 185, 116 U. S. 80, 6 S. Ct. 291, 29 L. Ed. 544; Barrett v. Bigger, 1927, 57 App. D. C. 81, 17 F. 2d 669. The law is also settled that a paroled prisoner who has, in violation of parole, left the State in which he was convicted of crime is, within the Constitutional provision in question, a person charged with crime in the State where he was convicted and one who has fled from the justice of that State, so that he is subject to extradition. Drinkall v. Spiegel, Sheriff, 1896, 68 Conn. 441, 36 A. 830, 36 L. R. A. 486; Hughes v. Pflanz, 6 Cir., 1905, 138 F. 980. It is also settled that a paroled prisoner who has left the State of conviction pursuant to the terms of his parole, but later violates the same, is a person charged with crime and a fugitive from justice subject to extradition. People *ex rel.* Hutchings v. Mallon, 218 App. Div. 461, 218 N. Y. S. 432, affirmed without opinion 1927, 245 N. Y. 521, 157 N. E. 842; *Ex parte* Nabors, 1928, 33 N. M. 324, 267 P. 58."

In *Brewer v. Goff* (1943), Circuit Court of Appeals, Tenth Circuit, 138 F. 2d 710, the court at page 712 said:

> "The only prerequisites to extradition from one state to another are, that the person sought to be extradited is substantially charged with a crime against the laws of the demanding state, and that he is a

fugitive from justice. McNichols v. Pease, 207 U. S. 100, 108, 109, 28 S. Ct. 58, 52 L. Ed. 121; Appleyard v. Massachusetts, *supra;* Roberts v. Reilly, *supra.* Admittedly, the extradition papers are in proper form, that is, he is substantially charged with having violated his parole in California, and it is well established that a parole violation is an extraditable offense within the meaning of the statute. Reed v. Colpoys, 69 App. D. C. 163, 99 F. 2d 396, certiorari denied 305 U. S. 598, 59 S. Ct. 97, 83 L. Ed. 379; *Ex parte* Williams, 10 Okl. Cr. 344, 136 P. 597, 51 L. R. A., N. S., 668; *Ex parte* McBride, 101 Cal. App. 251, 281 P. 651; People *ex rel.* Westbrook v. O'Neill, 378 Ill. 324, 38 N. E. 2d 174. The inquiry whether the appellant is a fugitive from justice is one of fact, to be resolved by the chief executive of the State of Oklahoma to whom the demand for extradition is made, and his judgment thereon is not subject to judicial impeachment by habeas corpus unless it conclusively appears that the person sought to be extradited could not be a fugitive from justice under the law."

U. S. ex rel. Faris v. McClain, District Court, M. D. Penn. (1942), 42 Fed. Supp. 429, held that a petitioner on habeas corpus who had been charged and convicted for the crime of forgery and sentenced for the crime, and who thereafter escaped, was still charged with forgery in Virginia.

In *Pelley v. Colpoys,* 122 F. 2d 12 (1941), the petitioner for a writ resisting extradition sought to raise the issue that a suspended sentence under North Carolina law was limited to five years and that the period had expired prior to the request of the governor for extradition,

and that the extradition requested violated the Fourteenth Amendment to the Constitution of the United States. The court said at page 14:

> "Petitioner is relying on a period of limitations, a matter which can be raised only in the courts of North Carolina. See Biddinger v. Commissioner of Police, 245 U. S. 128, 38 S. Ct. 41, 43, 62 L. Ed. 193, where the Supreme Court said: 'This much, however, the decisions of this court make clear: That the proceeding is a summary one, to be kept within narrow bounds, not less for the protection of the liberty of the citizens than in the public interest; that when the extradition papers required by the statute are in the proper form the only evidence sanctioned by this court as admissible on such a hearing is such as tends to prove that the accused was not in the demanding state at the time the crime is alleged to have been committed; and, frequently and emphatically, that defenses cannot be entertained on such a hearing, but must be referred for investigation to the trial of the case in the courts of the demanding state.' "

A writ of certiorari was denied by the Supreme Court of the United States on October 13, 1941, 62 Sup. Ct. 70, 86 Law Ed. 499.

35 Corpus Juris Secundum, Section 9, at page 323, in part, states:

> "As used in constitutional and statutory provisions relating to extradition, the term 'charged' is construed in its broad signification to cover any proceeding which a state may see fit to adopt by which a formal accusation is made against an alleged criminal. In a stricter sense, however, a person is 'charged' with crime when an affidavit is filed alleging the commis-

sion of the offense and a warrant is issued for his arrest. A person remains charged with crime within the meaning of the constitutional and statutory provisions although he has been convicted, while the judgment of conviction remains unsatisfied. . . ."

Other citations supporting the proposition that convicted prisoners who escape or who are released on parole and violate the terms of parole are notwithstanding such conviction, charged with crime within the provisions of Article IV, Section 2, Clause 2 and therefore subject to extradition:

78 *A. L. R.* 419 on the subject "Extradition of Escaped or Paroled Convict or One at Liberty on Bail";

22 *Am. Jur.* 264, Sec. 25, on the subject entitled "Paroled or Escaped Convicts";

35 *C. J. S.*, Sec. 327, Subdiv. (2), on the subject "Escaped or Paroled Prisoners";

State ex rel. Lee v. Brown, 166 Tenn. 669, 64 S. W. 2d 841, 91 A. L. R. 1246, certiorari denied 292 U. S. 638, 78 L. Ed. 1491;

People ex rel. Hesley v. Ragen (1947), 396 Ill. 554, 72 N. E. 2d 311;

Tines v. Hudspeth, 164 Kan. 471, 190 P. 2d 867, 871;

Ex parte Foster (1936), 61 P. 2d 37, 60 Okla. Cr. 50;

Ex parte Haynes (1924), 267 S. W. 490, 98 Tex. Cr. R. 609.

The premise therefore urged by appellee to the effect that the limited scope of inquiry embodied in Article IV,

Section 2, Clause 2, is not applicable to extradition of convicted prisoners is clearly untenable. The premise being untenable, it follows that appellee's conclusion that asylum states may consider and are in fact compelled to make determination whether the judgments of the courts of sister states contravened or violated the due process clause is erroneous. *Williams v. North Carolina,* 317 U. S. 287, and *Griffin v. Griffin,* 327 U. S. 220, are therefore clearly not in point because they are not extradition cases.

Moreover, provisions of the Uniform Extradition Act in force and effect in California are in direct conflict with the proposition urged by appellee. One of such provisions, Section 1548.2 of the Penal Code of the State of California, provides in part as follows:

> ". . . Such demand shall be accompanied by a copy of an indictment found or by information or by a copy of an affidavit made before a magistrate in the demanding State together with a copy of any warrant which was issued thereon; or such demand shall be accompanied by a copy of a judgment of conviction or of a sentence imposed in execution thereof, together with a statement by the executive authority of the demanding State that the person claimed has escaped from confinement or has violated the terms of his bail, probation or parole. . . ."

The designated section has heretofore been quoted in appellant's opening brief at pages 39 and 40.

Also at pages 40 and 41 of appellant's opening brief, Section 1549.2 of the Penal Code of the State of California was quoted relating to the duty of the governor to

issue a warrant of arrest if a demand conformed to the provisions of the chapter, and also Section 1553.2 of the Penal Code relative to the restricted scope of inquiry by the governor and California courts in extradition matters.

Other issues raised in appellee's brief have been argued in appellant's opening brief.

Respectfully submitted,

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